McKinnon, Liberty's Chief Operating Officer until mid-1993, concluded that Mr. Nourain was fully aware of his licensing responsibilities. Mr. McKinnon testified:

> Q: Was there any discussion with Mr. Nourain about having to await FCC authorization prior to activating a path?
>
> A: Yes. Stern was very alert to that. I was very alert to that. And Behrooz, with his history in the industry, was very alert to that. Both of those gentlemen were professional engineers, and they were very attuned to the timing of this.
>
> Q: Can you recall any specific discussion you had with Mr. Nourain regarding awaiting FCC authority?
>
> A: I can't recall a day and a date, [or] frequency of conversation, but I can say that when we would plan a construction project, certainly one of the critical path success factors, and it was always the second to the last thing before activation, was did we receive FCC approval. That was always part of our construction planning.
>
> Q: And to your knowledge was Mr. Nourain aware of this?
>
> A: Frankly, I think he was acutely aware of it.[47]

Mr. Lehmkuhl, the attorney at Pepper & Corazzini who prepared Liberty's license applications, similarly testified in support of Mr. Nourain's understanding of the application process:

> Q: Did you consider Mr. Nourain generally to be attentive to your activities with the FCC on Liberty's behalf?
>
> . . . .
>
> A: I would generally say that yes, he understood. It was my impression that he understood what was going on with the applications. That was one of the purposes of this inventory [the Lehmkuhl Memorandum].[48]

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[47]McKinnon Dep. at 11:19-12:18 (emphasis added) (Ex. 8).

[48]Lehmkuhl Aug. 7 Dep. at 178:21-179:18 (Ex. 7).

Mr. Lehmkuhl testified that Mr. Nourain signed applications, received copies of completed applications, discussed the status of pending applications with Mr. Lehmkuhl, and that Liberty received the licenses themselves from the FCC, which Liberty then sent to Mr. Lehmkuhl. Mr. Lehmkuhl testified as follows:

> Q: After the application was filed, would you report that to Liberty?
>
> A: Yes. I would send them a copy.
>
> Q: Who would the copy be addressed to at Liberty?
>
> A: Behrooz.[49]

Next, Mr. Lehmkuhl testified:

> Q: During either 1994 or 1995, did anyone from Liberty ever call you, asking about the status of a pending application or STA request that you had filed?
>
> A: Yes.
>
> Q: Let's talk about 1994 first. In 1994, who would make those inquiries?
>
> A: Mr. Nourain.
>
> Q: Same question for 1995.
>
> . . . .
>
> A: Mr. Nourain or Mr. Berkman.[50]

The license applications themselves list Mr. Nourain as the person at Liberty to whom the license should be sent.[51] Mr. Lehmkuhl testified that Liberty would receive a copy of

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[49]Lehmkuhl May 22 Dep. at 10:8-13 (Ex. 7).

[50]Id. at 54:15-55:4 (emphasis added) (Ex. 7).

[51]Ex. D to Price Dep. (Ex. 3).

the license from the FCC, then send the license to him.[52] Contrary to the claims in the Joint Motion, then, the evidence demonstrates that Mr. Nourain clearly understood the FCC license application process and was involved at every stage of that process.

Similarly, Mr. Nourain's own actions belie his claim that he assumed he had STA grants for the microwave facilities in question. If Mr. Nourain truly had such a belief, he would have waited at least the minimum time he believed the FCC needed to process Liberty's application or STA request. Mr. Nourain testified at his deposition in this proceeding that he believed, before learning of TWCNYC's petitions to deny, that Liberty needed about 60 days to obtain the Commission's authorization, beginning from the time Liberty sent the necessary information to Comsearch.[53] However, Mr. Nourain rarely followed this schedule; sometimes he activated pathways much sooner, as little as a few days or a few weeks after sending the frequency coordination information to Comsearch. Moreover, Mr. Nourain never "prematurely activated" microwave paths to any of the addresses that Liberty already was serving by hardwire interconnection, even though applications for those paths had been filed concurrently with applications for the paths that were "prematurely activated." If he truly believed that all of Liberty's OFS applications were accompanied by corresponding STA requests and if he truly believed that these applications or requests would be granted in 60 days, he would have "prematurely activated" paths to these hardwired addresses as well.

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[52]Lehmkuhl May 22 Dep. at 15:9-11 (Ex. 7).

[53]Nourain May 29 Dep. at 127-30 (Ex. 6).

Finally, the Lehmkuhl Memorandum clearly identifies three transmitters for which Liberty had no license and no STA authority -- 30 Waterside, 335 Madison and 567 Fifth Ave.[54] On the second page of the Memorandum, Mr. Lehmkuhl sets out a table titled "Liberty Cable Co., Inc. Pending Applications & STAs." The table shows that none of the three transmitters has a call sign. More importantly, the word "No" appears under the column headed "STA?". Even without knowledge of the Lehmkuhl Memorandum, Mr. Nourain could not have mistakenly believed that he had authority to activate any path from these transmitters. The FCC requires that a license holder post, or have immediately available at the transmitter, the FCC license that authorizes the transmitter's use.[55] Mr. Nourain knew of this requirement. He testified in his deposition:

> Q: Now, are your aware of the FCC requirement that the license, or a copy of the license be actually posted or taped up to the wall next to the transmitter?
>
> . . . .
>
> A: [G]enerally speaking, yes, the licenses should be posted at the transmitter locations or kept at one location, at the transmit locations.[56]

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[54]Lehmkuhl Mem. at FCC/CP 016140 (Ex. 5). With microwave, a single transmitter can serve multiple paths. Thus, it is conceivable that an engineer could mistakenly believe that a license existed for a path to point "A" if he saw a license at the transmitter site for a path to point "B" (assuming that he did not bother to read the posted license). However, if the transmitter was not licensed for any path, there would be no posted license.

[55]47 C.F.R. § 94.107.

[56]Nourain Aug. 1 Dep. at 26:8-21 (Ex. 6).

The absence of any posted licenses next to the three transmitters in question necessarily would have put Mr. Nourain on notice that he was activating the paths served by these transmitters illegally.

3. The Joint Motion's Accounts Of How And When Liberty Learned About Its Illegal Operations Conflicts With The Testimony Of Liberty's Witnesses.

Even though its witnesses uniformly testified that they learned of Liberty's unlicensed microwave operations as a result of TWCNYC's May 5, 1995 FCC filing, in the Joint Motion for Summary Decision, Liberty claims that it learned about its unlawful operations *on its own*, in "late April" 1995, before it received TWCNYC's May 5 paper. This discrepancy is highly significant, not only for the purpose of determining whether a hearing is needed to resolve disputed issues of fact, but also for the purpose of determining the seriousness of Liberty's failure, in its May 4, 1995 STA requests, to have told the Commission that the paths for which STA was being requested already were operational. If Liberty knew about its illegal operations in "late April," then the omission from the May 4 STA requests was a knowing omission. If, on the other hand, Liberty did not know about its unlicensed operations until after May 5 (a proposition that is contrary to substantial evidence), then the failure to identify the paths as already operational in the May 4 STA requests may not have been intentional. This is a central issue in this case, and it is surprising that Liberty and the Bureau would ask the Presiding Judge to decide this case without a hearing, given that the Joint Motion does not even attempt to resolve this question.

Asserting that the discovery was in late April 1995, the Joint Motion states:

> At the end of April 1995, in the course of ongoing litigation over Time Warner's petitions to deny or condition grant of Liberty's license applications,

> Liberty discovered that the company had initiated service in some buildings without prior authorization from the Commission.[57]

The Joint Motion continues, "[w]hile Liberty was taking swift steps internally to investigate the extent of the problem, . . . TWCNYC discovered two buildings at which Liberty was providing service without prior authorization from the Commission."[58]

By contrast, Howard Milstein claims he first learned about illegal service from TWCNYC's May 5, 1995 filing.

> Q: I want to . . . ask you when it first came to your attention that Liberty was or might be operating microwave paths without FCC licenses.
>
> . . . .
>
> A: I think it was brought to our attention because Time Warner made a complaint to some regulatory agency.
>
> . . . .
>
> Q: So it would be correct to say that whenever that complaint had been filed at the agency, that your knowledge of the fact that Liberty was operating microwave paths, some microwave paths, without a license, would have come after that complaint had been filed with the agency?
>
> A: That's correct.[59]

Like his brother's, Edward Milstein's testimony is substantially the same:

> Q: Now, did there come a time when you became aware of the fact that Liberty had some microwave paths in operation for which it would not have FCC licenses or other grants of authority?

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[57]Jt. Mot. at ¶ 36 (emphasis added); but see Nourain May 29 Dep. at 76:18-77:6 (learned from Time Warner in late April 1995 that Liberty was operating some facilities without FCC authorization) (Ex. 6).

[58]Jt. Mot. at ¶ 37.

[59]H. Milstein Dep. at 28:1-29:4 (Ex. 2).

A: Yes.

Q: When did you have that awareness?

. . . .

A: When Time Warner made the filing with the FCC.[60]

Mr. Price also claims that he learned about Liberty's unlicensed microwave operations after May 5, 1995, as a consequence of TWCNYC's FCC filing.[61]

Not only does the Joint Motion take a position contrary to the testimony of Liberty's most senior officers and owners, but also other evidence directly contradicts that testimony. The Affidavit of Lloyd Constantine, filed by Liberty in Support of Liberty's Application for Review of Liberty Cable Co., Inc., on September 20, 1995, states that Howard Milstein, Liberty's chairman, learned about certain of Liberty's unauthorized microwave paths in "late April" 1995.[62]

4. Liberty's Failure To Disclose When It Learned About The Illegal Pathways Made Known To The Commission In July 1995 Is Itself A Lack Of Candor.

It is undisputed that Liberty illegally activated and operated six microwave paths without ever having filed applications or STA requests for the paths.[63] Four of these paths were not disclosed to the Commission in either the May 17, 1995 Surreply or in Liberty's

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[60]E. Milstein Dep. at 41:10-19 (Ex. 1).

[61]Price May 28 Dep. at 208:2-17; see also id. at 182-185 (Ex. 3).

[62]JX 4 ("JX" refers to the Exhibits attached to the Jt. Mot.).

[63]Liberty operated three of these pathways for a full year without having filed any license or STA request. The other three pathways were operated for periods of between one and nine months before any application was filed.

June 16, 1995 response to the Commission's first request under 47 U.S.C. § 308(b) for information about all of Liberty's unlicensed operations. These four paths were the subject of applications filed by Liberty on July 17, 1995, and their operational status was disclosed to the Commission in STA requests that were filed July 24, 1995. Liberty has offered no explanation of why these four unlicensed paths were not disclosed to the Commission on May 17 or June 16. Nor has it said when it did discover these unlicensed paths.

The Joint Motion acknowledges that Liberty applied for licenses "after service had already commenced to these buildings, and Liberty failed to indicate this information in its license applications."[64] The Joint Motion dismisses this transgression, saying that "Section 1.65 was technically violated. However, Liberty did fully disclose the circumstances surrounding these premature operations in other contexts to the Commission."[65] This cryptic reference is either meaningless or is a deliberately obscure reference to the "Internal Audit Report" ("IAR") that Liberty supplied the Bureau on a confidential basis in response to a second Section 308(b) request in August 1995 that sought information about the circumstances of these four additional unlicensed paths. While the IAR has been seen by the Bureau, it has not been made a part of the record here.[66] If this sentence does, in fact,

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[64]Jt. Mot. at ¶ 99.

[65]Id. (emphasis added).

[66]Indeed, the Presiding Judge may recall that Liberty threatened to seek contempt sanctions from the D.C. Circuit if the Presiding Judge directed Liberty to supply a copy of the IAR to counsel for TWCNYC. See Bartholdi's (Liberty's) Opposition to TWCNYC's Consolidated Motion to Compel Responses to Interrogatories and Production of Documents, filed May 6, 1996. (The D.C. Circuit has granted a stay pending appeal of the Commission's Order directing Liberty to make the IAR public and deliver a copy of it to TWCNYC. Order, Civ. 96-1030 (D.C. Cir. April 24, 1996.)

refer to the IAR, it constitutes an admission that this proceeding cannot be resolved -- by summary decision or otherwise -- until the IAR is made a part of the record here.

There is certainly nothing in this record that shows that Liberty "fully disclosed" the circumstances surrounding the activation of these four unlicensed pathways, not even when they were discovered.[67] In fact, the Joint Motion actually misrepresents when Liberty discovered these illegal operations. It asserts:

> On July 13, 1995, Price issued a memorandum requesting the current status of license applications for existing and pending Liberty buildings. . . . Liberty discovered four more instances of premature activation for which there remained pending applications . . . . Liberty immediately filed for license applications on July 17, 1995 and filed STAs one week thereafter . . . .[68]

In fact, Liberty had been serving each of these locations for at least nine months, and had discovered that they were unlicensed because Liberty asked Comsearch to perform frequency coordination for paths to these addresses. This was done weeks before Mr. Price's July 13 memo.

Comsearch employee Duy Duong testified that Liberty asked him to perform frequency coordinations for these four paths before June 30, 1995:

> Q: I would like to take you back to Exhibit 1 of your deposition. That's the letter dated June 30, 1995. If I understood your testimony correctly -- let me ask this: The information that you need to do a frequency coordination is not contained in this letter, is it?

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[67]See Jt. Mot. at ¶ 41.

[68]Id. at ¶¶ 40-42 (citations omitted). However, elsewhere, the Joint Motion admits that the operational status of those paths was not disclosed to the Commission until July 24, 1995, when STA requests were filed. Id. at ¶ 42.

A: No, it's not.

Q: When did you get the information necessary to do the requested coordinations that are mentioned in this letter?

A: It would have to be beforehand, but I don't remember the date.[69]

Moreover, there is other evidence that Liberty clearly knew about its illegal activation and operation of the four paths no later than June 29, 1995. On that date it sent its attorneys to Comsearch to investigate whether Comsearch had any record of receiving frequency coordination data for those paths. Liberty's own counsel stated in Mr. Duong's deposition:

Q: Do you recall that on that date my colleague and I asked you if you had any documents pertaining to four particular paths, and those were 1295 Madison, 38 East 85th, 430/440 East 56th and 380 Rector Place?

A: Yes.

. . . .

Q: [Mr. Navin, for Comsearch] Since we are starting to get specific about dates, you indicated a year ago.

. . . .

[Mr. Spitzer, for Liberty] June 29th is my recollection.

Q: [by Mr. Spitzer] Does that sound right to you?

A: I can't recall.

Q: [by Mr. Spitzer] But there is only one such meeting and it was out at your offices, and I can represent I'm quite sure it was June 29th, 1995.[70]

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[69]Duong Dep. at 25:14-26:3 (Ex. 10); see also Letter from Behrooz Nourain, Liberty, to Duy Duong, Comsearch, June 30, 1995 (requesting coordination of 12 unlicensed pathways), Ex. 1 to Duong Dep. (Ex. 10).

[70]Duong Dep. at 31:7-32:14 (emphasis added) (Ex. 10).

The above testimony of Mr. Duong and Mr. Spitzer's representations demonstrate that Liberty knew it was operating those four paths illegally no later than June 29, 1995. Liberty's statement in the Joint Motion that it "discovered" the four paths after Mr. Price issued his July 13 memo and that Liberty "immediately" filed applications for the paths is incorrect. The July 13 memo had nothing to do with Liberty's discovery; in fact, the memo specifically identifies the paths in question. The only question -- still unanswered -- is when Liberty actually learned about these four paths.

Moreover, the assertion in the Joint Motion, that "the frequency clearance was initiated for these four buildings . . . long before service was commenced" is an undisputed fact, is contrary to evidence that Liberty acknowledges exists.[71] The Joint Motion admits that "Comsearch . . . does not have any record of receiving these requests from Liberty."[72] The absence of Comsearch business records showing receipt of these requests when such records should exist tends to prove that the frequency clearance was never initiated for the four buildings. Thus, with evidence pointing to two different answers to the same question, there can be no "undisputed" fact.

The Joint Motion ignores the fact that there are no Comsearch documents of any kind to corroborate Liberty's assertions that it requested frequency coordination from Comsearch for two other paths that had been activated before an application had been filed. The only documents arguably supporting such an assertion are Liberty's own "Purchase Orders."[73]

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[71]Jt. Mot. at ¶ 41.

[72]Id.

[73]See Ex. 7 to Ontiveros Dep. (Ex. 4).

Moreover, even assuming the truth of Liberty's claim that it requested frequency coordinations for these two paths, Liberty waited an obviously inadequate amount of time for any action to be taken before activating these paths. Liberty waited, at most, five days after sending the Purchase Order to Comsearch for 441 East 92d Street before it activated the path, and about three weeks after sending the Purchase Order to Comsearch before Liberty activated the path to 433 East 56th Street.[74] With these brief intervals between Liberty's request for frequency coordination (assuming such requests were made) and its commencement of service to these addresses, Liberty obviously knew it was activating service illegally.

5. The Joint Motion Fails To Address Additional Liberty Misrepresentations Made In Support Of The Captioned Applications.

There are additional misrepresentations by Liberty that the Joint Motion does not even address. On May 4, 1995, Liberty filed STA requests for 14 of the pathways that Liberty had been operating without Commission licenses. Mr. Nourain signed these requests on Liberty's behalf, which were filed by Mr. Lehmkuhl. The STA requests do not, however, disclose Liberty's illegal operations. Instead, Liberty misrepresented to the Commission Liberty's reasons for seeking STAs, implying that, absent a grant, it would lose customers who currently were not being served:

> If Liberty cannot meet its potential customers' demand for its service, those potential customers will cancel their contracts with Liberty and remain with Time Warner. ... A series of occurrences where Liberty fails to deliver its service within 30 days and where potential customers cancel their subscriptions

[74]HDO, Exhibit A.

> to Liberty's service will immeasurably damage Liberty's business and reputation. . . . Time is, therefore, of the essence.[75]

These deceptive statements could only have on purpose: to benefit Liberty by leading the Commission to believe that the paths in question were not operational and that it was therefore urgent that the Commission allow them to be activated. The Joint Motion does not even attempt to explain how Liberty made these misrepresentations to the Commission, especially when its authorized employee who signed them, Mr. Nourain, knew these paths were already in operation.

A second misrepresentation occurred after TWCNYC's May 5, 1995 filing that exposed Liberty's illegal operation of two microwave paths. Liberty, faced with the likelihood that several more of its illegally operated pathways would soon be uncovered, finally admitted what currently appears to be the majority of its unlicensed operations on May 17, 1995, in a Surreply to TWCNYC's Petition to Deny.

In that Surreply, however, Liberty again misrepresented the circumstances of its illegal operations in an effort to mitigate the consequences of its conduct:

> Mr. Nourain was unaware of the petitions against Liberty's applications until late April of 1995. . . . Thus, without knowledge that his actions were in violation of the Commission's rules, and without intent to violate those rules, Mr. Nourain commenced operation prior to grant.[76]

Liberty slickly avoided stating the actual date that it first learned about its illegal operations, and did not disclose when it had activated the various pathways. The Surreply,

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[75]See, e.g., Liberty Cable Co., Inc.'s Application for Special Temporary Authority, FCC File No. 708779, OFS Station WNTM385, signed May 3, 1995 (emphasis added) (Ex. 11).

[76]Liberty Surreply at 3.

in fact, does not even state that Mr. Nourain was ignorant at any point about the illegal operation of the paths; it only claims that he "commenced" service without such knowledge. It says nothing about what knowledge he may have acquired later.

In response to the Commission's 308(b) request of June 9, 1995, Liberty was forced to state when it had activated service along the various pathways. However, Liberty continued its misleading attempts to blame its action on Mr. Nourain's assumptions about the status of applications:

> Mr. Nourain did not learn that Time Warner was opposing all Liberty applications, including the applications to provide service to the locations Liberty was serving without authority, until April, 1995.[77]

In none of the responses to the Section 308(b) letter did Liberty disclose when any of its personnel actually learned about Liberty's illegal microwave operations, or the other facts and circumstances surrounding the discovery of its illegal microwave operations. Most significantly, the response fails to mention the existence of a document -- the Lehmkuhl Memorandum -- that advised Messrs. Price and Nourain that applications to serve certain addresses had not been granted, before any of these paths had been placed in operation. This document makes the issue of whether Mr. Nourain knew about petitions to deny immaterial. He was informed by Liberty's lawyers that the company did not have authority to serve certain addresses, but Mr. Nourain continued to serve them and commenced serving others.

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[77]Letter from Howard J. Barr, Counsel for Liberty, to Michael B. Hayden, Chief, Microwave Branch, FCC, June 16, 1996 ("Barr Letter") (Ex. 12).

B. Liberty Deliberately Mischaracterized Itself As A SMATV Operator In Its Applications For OFS Service And In Its Applications For STA.

Although it always has characterized itself to the Commission as an "SMATV operator," Liberty has, for many years, covertly built cable connections between non-commonly owned buildings that it serves ("non-common buildings"). Although, under federal and state law, this action required that Liberty hold a cable franchise, Liberty never had such authority. This lack of candor with the Commission was deliberate; and, even after TWCNYC made an issue of Liberty's illegal use of cable connections to non-common buildings, Liberty continued to violate the law by establishing additional cable interconnections.

Liberty established its first hardwire connection of non-common buildings on or about November 23, 1992.[78] Thereafter, from November 23, 1992 through April 13, 1995, Liberty established hardwire connections to provide multichannel video programming service between at least 12 additional pairs of buildings, all but three of which Liberty now admits were not under common ownership, control or management.[79]

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[78]Jt. Mot. at ¶ 49. In its federal court complaint, Liberty alleged that it began such practice in January 1993.

[79]HDO, App. B. Although the Joint Motion claims in a footnote that three pairs of hardwired buildings are commonly owned or managed, it also admits that no evidence was adduced by Liberty to substantiate that claim. Jt. Mot. at n.19. Nor is that claim legally supported. For example, the fortuitous circumstance that two cooperatives or condominiums may have agency agreements with the same management company does not render those buildings under "common management." See Satellite Entertainment & Communications, Inc. v. Board of Managers of Baybridge at Bayside Condominium III, Index No. 26310/92 (N.Y. Sup. Ct. Queens Co. Feb. 22, 1995). Under Article 9-B of the New York Real Property Law, condominiums are managed by a board of managers elected by the unit owners. Cooperative apartment buildings, like other corporations, are managed by a board

(continued...)

The Joint Motion contends that "[t]he uncontroverted record with respect to Liberty's use of hardwire interconnection establishes that Liberty's principals believed, in good faith, that all hardwire connections not traversing public rights-of-way were legal and did not require a franchise from the local franchising authority."[80] The Joint Motion also avers that "Liberty's violation of cable franchising requirements resulted from a misunderstanding about the legal consequences of providing service to customers by hardwire interconnections,"[81] and that Liberty disclosed those systems in public proceedings.[82]

In focusing exclusively on whether or not Liberty needed a franchise to join pairs of non-commonly owned buildings with cable interconnections and on whether or not Liberty had a "good faith" belief that it did not need a franchise for such activity, the Joint Motion sidesteps the principal mandate of the HDO with respect to this aspect of Liberty's conduct:

> to determine the facts and circumstances surrounding Liberty's hardwiring of interconnected, non-commonly owned buildings without first obtaining a cable franchise, and whether these apparent violations bear on its disqualification to be granted the above-referenced OFS licenses.[83]

The salient fact here is that even Liberty must acknowledge that it engaged in conduct that, by its own admission, required a franchise and violated the Communications Act, yet it

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[79](...continued)
of directors elected by the shareholders/proprietary tenants. Accordingly, each condominium and cooperative has its own independent "management" even if they delegate ministerial functions to the same "management company."

[80]Jt. Mot. at ¶ 46 (citations omitted).

[81]Id. at iii.

[82]Id. at ¶¶ 84, 85.

[83]HDO at ¶ 13.

concealed that activity from the Commission by characterizing itself as an "SMATV operator." It did so for the obvious reason that to have acknowledged its conduct in interconnecting non-commonly owned buildings with cable, even without admitting the violation of the law, would have jeopardized the grant of its pending applications.

Moreover, the facts alleged to support the contention that Liberty acted in good faith are far from uncontested. To the contrary, the record establishes that Liberty fully understood the legal consequences of providing service via hardwire connections to non-common buildings, that it actively concealed its use of hardwire connections, and that it misrepresented the nature of its operations in filings before the FCC.

1. Liberty Was Well Aware Of Its Franchise Obligations Under Federal And State Law.

The appropriate point of departure for analyzing Liberty's conduct is federal law, as articulated in the Commission's December 1990 exposition of the Cable Act's definition of "cable system."[84] In its Cable Definition Rule, the FCC determined that the so-called SMATV exclusion embodied in Section 602(6) of the Cable Communications Policy Act of 1984 (the "Cable Act") (as then existing) was not available where

> a wire or cable is used to interconnect . . . SMATV equipped buildings . . . unless the several buildings are commonly owned, controlled or managed and the system's physically closed interconnection paths do not use a public right-of-way.[85]

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[84]In re Definition of a Cable Television System, 5 FCC Rcd 7638, ¶ 34 (Dec. 21, 1990) (the "Cable Definition Rule").

[85]Id. (emphasis added).

Shortly thereafter, the Commission amended its operational fixed service ("OFS") rules to allow private SMATV operators to apply for 18 GHz point-to-point microwave licenses.[86] Indeed, Liberty actively participated in that proceeding and was one of the most vigorous proponents of the Commission's rule change.[87] In making that change, the Commission expressly indicated that SMATV operators could not use their 18 GHz licenses to provide video programming service over a "cable system" (as defined by Congress and in the Commission's Cable Definition Rule) without first obtaining a cable franchise.[88] In 1991, Liberty began obtaining FCC licenses and interconnecting non-common buildings with 18 GHz microwave links.

The evidence squarely contradicts the Joint Motion's claim that Liberty failed to understand the legal consequences of providing service to non-common buildings using hardwire connections. In a letter to the Commission dated April 7, 1992, Liberty urged the FCC to defend its 1990 Cable Definition Rule in Beach Communications, Inc. v. FCC, a constitutional challenge in the United States Court of Appeals for the D.C. Circuit.[89] In that letter, Liberty observed that the Beach petitioners were each seeking

> to use cable to interconnect its systems at contiguous non-commonly owned multifamily properties. This configuration, defined in Beach Communications as an 'external quasi-private SMATV' system is a 'cable system' pursuant to

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[86]See In Re Amendment of Part 94 of the Commission's Rules to Permit Private Video Distribution Systems of Video Entertainment Access to the 18 GHz Band, Report and Order, 6 FCC Rcd 1270 (Feb. 28, 1991).

[87]See, e.g., JX 29 at 4-5.

[88]Report and Order, 6 FCC Rcd 1270 (emphasis added; footnotes omitted).

[89]JX 29 at 1.

> 47 U.S.C. § 552(6) and the Cable Definition Rule and thus subject to local franchise requirements.[90]

Liberty advised the Commission that it "currently operates several 'non-physical video delivery systems' at a number of locations throughout the New York metropolitan area."[91] Liberty further explained that it "frequently has the opportunity to use its existing antenna reception site to serve contiguous multifamily properties which are under different ownership. The contiguous multifamily property could be wired directly from the established reception site without crossing public rights of way."[92] Assessing the impact of the Commission's Cable Definition Rule on this situation, Liberty explained that

> [i]f the cost of the equipment were the only consideration, then Liberty would chose the Cable Option [i.e., string cable from the property it already serves to the contiguous property]. However, under the Cable Definition Rule, the exercise of the Cable Option also means subjecting the two properties wired together to local regulation as a 'cable system'. . . *Accordingly, Liberty will expand its system to contiguous properties by using 'non-physical' delivery systems.*[93]

Thus, without question, Liberty understood as early as 1992 that the provision of video programming service to non-common buildings using a hardwire connection would subject the company under both federal and state law to franchise obligations as the operator of a "cable system." Liberty also clearly knew that complying with these obligations would

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[90]Id.

[91]Id. at 7.

[92]Id.

[93]Id. (italics added).

impose economic costs, thereby reducing Liberty's profits.[94] Most importantly, Liberty represented to the Commission that it would not serve contiguous properties by "physical" (i.e., cable) interconnection. Seven months later, it did precisely the opposite of what it had told the Commission it intended to do, and connected two non-common buildings with a cable.

In June 1992, the D.C. Circuit held in Beach Communications v. FCC, that the definition of a "cable system" in the 1984 Cable Act, as clarified in the Commission's Cable Definition Rule, was unconstitutional.[95] Liberty established its first hardwire connection of non-common buildings on or about November 23, 1992, knowing that, but for the D.C. Circuit's invalidation of the statute, such activity would have been in violation of federal law. However, on June 1, 1993, the Supreme Court reversed the D.C. Circuit's decision in Beach, effectively closing Liberty's brief window of opportunity to legally interconnect non-commonly owned buildings with cables.[96]

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[94]Liberty also argued that economic costs would be imposed if it were required to obtain the consent of local property owners to establish cable connections between non-commonly owned buildings. JX 29.

[95]Beach Communications, Inc. v. FCC, 965 F.2d 1103, 1006 (D.C. Cir. 1992), cert. granted, 506 U.S. 997 (1992), rev'd and rem., 508 U.S. 307 (1993), on remand, 10 F.3d 811 (D.C. Cir. 1993).

[96]FCC v. Beach Communications, Inc., 508 U.S. 307 (1993). Subsequently, on October 22, 1993, the D.C. Circuit issued its order on remand from the Supreme Court dismissing the Beach petitioners' remaining Constitutional claims. Beach Communications, Inc. v. FCC, 10 F.3d 811 (D.C. Cir. 1993).

Although Liberty clearly knew of these developments in the law, the company did not alter its unlawful conduct.[97] It did not stop establishing hardwire connections between non-common buildings; it did not apply to the FCC for 18 GHz licenses to substitute radio paths for its hardwire connections; it did not apply for a cable franchise;[98] it did not commence litigation to seek a declaration of its legal rights or other relief;[99] it did not disclose to federal or state officials that it was operating what it knew under federal and state law were unfranchised cable systems, and it continued to characterize itself as an SMATV operator. Instead, Liberty proceeded to establish service at seven additional non-common buildings using illegal hardwire connections: 164 E. 87th St. (October 21, 1993); 44 W. 96th St. (December 15, 1993); 152 W. 57th St. (January 31, 1994); 239 E. 74th St. (March 28, 1994); 525 E. 86th St. (May 5, 1994); 425 E. 58th St. (May 25, 1994); and 170 W. End Ave. (May 26, 1994).[100]

2. TWCNYC's Initial Challenge And Liberty's Response.

On or about May 27, 1994, Time Warner filed a complaint with the New York State Commission on Cable Television ("NYSCCT") alleging, inter alia, that Liberty was operating cable systems without a franchise in violation of the law, based on Liberty's

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[97]See Liberty Cable Co. v. City of New York, 893 F. Supp. 191, n.25 (S.D.N.Y.), aff'd, 60 F.3d 961 (2d Cir. 1995).

[98]As found by Judge Preska, "[t]here is no satisfactory explanation as to why Liberty did not request a franchise promptly after June 1, 1993." Id. at 205.

[99]Plainly, Liberty was aware of this option. Indeed, in its letter to the FCC of April 1992, it had recommended that the Beach petitioners pursue this very course of action. JX 29 at 2.

[100]HDO, App. B.

hardwire interconnection of non-common buildings. In that complaint, TWCNYC identified three (3) pairs of non-common buildings to which Liberty was providing unfranchised cable service via hardwire interconnection.

On or about June 28, 1994 Liberty wrote to the NYSCCT denying that Liberty had engaged in any unlawful method of operation.[101] Although the Joint Motion now contends that Liberty "openly and forthrightly" admitted its hardwire interconnections between non-common buildings, the evidence contradicts that claim.[102] The record shows that, aside from one pair of buildings that Liberty claimed were under common management, Liberty failed voluntarily to identify any of the nine locations where it was operating non-common systems at the time.[103] Thus, state officials were left with the misimpression that there were only three locations where Liberty had established hardwire interconnections.

The Joint Motion contends that Liberty's response "directly stated Liberty's reliance on New York City's policy[104] that a franchise would not be required if Liberty did not use city property or public rights-of-way in providing Liberty's services"[105] and suggests that Liberty was relying on a 1992 letter from the general counsel of the New York City

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[101]JX 16.

[102]Jt. Mot. at ¶¶ 53, 84, 85.

[103]JX 16.

[104]While Liberty's president Peter Price later claimed that he orally informed two DTE officials (former Commissioner William Squadron and former General Counsel Christopher Collins) on March 18, 1992 that Liberty proposed to physically interconnect buildings not under common ownership, management, or control, these former officials filed affidavits in Liberty's federal court action denying Price's allegation. See Liberty Cable Co., 893 F. Supp. at 203-04.

[105]Jt. Mot. at ¶ 53.

Department of Telecommunications and Energy ("DTE") concerning a proposal made by Russian-American Broadcasting Company (the "RABC letter") as an expression of that policy.[106] This reliance is ill-founded. RABC expressly *declined* to request a "franchise;" it requested a "license." The DTE responded that there was no requirement "[u]nder the New York City Charter" for RABC to obtain a "license." The DTE further stated that "[a]ssuming, without admitting, that RABC is a 'cable system,' there are no provisions of City law which empower DTE to authorize the operation of cable systems other than through a franchise as set forth in Chapter 14 of the New York City Charter."[107] The DTE did not deny RABC a franchise (or state that it would deny it a franchise) because *RABC did not apply for a franchise*.

Moreover, Liberty's "reliance" argument is off the point. Even if the RABC letter did support a belief that state or municipal law did not require Liberty to have a franchise to build cable interconnections between non-common buildings, the RABC letter did not even address the federal law requirements applicable to a video program distributor such as Liberty or suggest that Liberty would not be required to have a franchise under federal law if Liberty should commence providing its multi-channel cable service to non-common buildings by cable interconnection. As Judge Preska noted, there were significant differences between the single-channel foreign language service RABC proposed to provide and the manner in which Liberty was operating.[108] Moreover, Liberty's professed belief that it did not need a

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[106]JX 16.

[107]Id.

[108]Liberty Cable Co. 893 F.Supp. at 204 n.21.

franchise is undermined by contrary statements issued by the Commission in the 1990 Cable Definition Rule and in the 1991 18 GHz Report and Order and by the Supreme Court's 1993 decision in Beach Communications, all of which were known to Liberty.

Finally, an opinion letter issued by the New York City DOITT in July, 1994 eliminated whatever basis Liberty may have had for believing in a city "policy" that did not require it to have a franchise to interconnect non-common buildings with a cable.[109] On or about July 6, 1994 Liberty wrote to Thomas J. Dunleavy, then Deputy Commissioner of DOITT, requesting written confirmation from the City that Liberty did not require a cable television franchise.[110] Mr. Dunleavy responded on July 22, 1994: "such a 'franchise' from the City is not required to provide a microwave transmission service *unless such service uses cable or a similar closed transmission path to connect (whether across city streets or only using private property -- see F.C.C. v. Beach Communications, Inc. 113 S. Ct. 2096 (1993)) buildings which are non commonly owned, controlled or managed.*"[111]

Interestingly, Liberty's description of its business in the request for an opinion was careful and deceptive:

> Liberty transmits cable television service *by means of microwave* to various multifamily buildings. In doing so, Liberty does not use any public streets, rights of way or other property of the City to deliver its cable television service. Liberty's television service is subsequently *carried by cable from the*

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[109]See Jt. Mot. at ¶ 47.

[110]Jt. Mot. at ¶ 54; JX 17. DOITT (Department of Information, Telecommunication and Technology) was the successor to the DTE.

[111]JX 18 (italics added).

> *microwave antenna directly to the building residents*, once again without the use of City property.[112]

Liberty said nothing about the provision of cable service to non-common buildings via hardwire connections that did not cross public property. Had DOITT simply confined itself to the narrow, but misleading, question put by Liberty's letter, Liberty might have received the more favorable answer that Liberty clearly had hoped for.

Thus, in July 1994 DOITT's letter reiterated what Liberty already knew from the Beach Communications decision: that if Liberty wished to provide service using a cable connection between two non-common buildings -- regardless of whether or not those paths crossed any City property -- it need to obtain a cable franchise from the City in order to comply with federal and state law. Liberty's president Peter Price acknowledged in his deposition that he had reviewed the DOITT letter on or about July 21, 1994.[113] Moreover, the Joint Motion admits that, in response to TWCNYC's petition, on or about August 23, 1994, the NYSCCT released an Order to Show Cause (the "Show Cause Order") to end Liberty's unfranchised operation of cable facilities.[114] It therefore is truly astonishing that Liberty continues to maintain that it "misunderstood" the legal consequences of its actions.[115]

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[112]JX 17 at 2 (italics added).

[113]Price May 31 Dep. at 21-23 (Ex. 3).

[114]JX 19; Jt. Mot. at ¶ 55.

[115]Also astonishing is the Joint Movants' claim that "DOITT did not request that Liberty discontinue the hardwire service." Jt. Mot. at ¶ 54. Again, DOITT was told only about Liberty's microwave service; it was never apprised of Liberty's hardwire connection.